IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 476 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESHBHAI KESHUBHAI GOHIL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MB PARIKH for Appellant(s) : 1,
MR.BHATE, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 24/07/2007

ORAL JUDGMENT

The present appeal is filed by the appellant – original accused No.1, challenging the legality and validity of the judgment and order of conviction and sentence (hereinafter referred to as the 'impugned

judgment and order') passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No.159 of 1990 on 29th August, 1992, whereby the present appellant has been held guilty of the charge of offence punishable under Section 326 of the Indian Penal Code and sentenced to undergo five years simple imprisonment and to pay a fine of Rs.5,000/-, in default of making payment of fine to undergo one year simple imprisonment. The learned trial Judge has in exercise of powers vested with him under the provisions of Section 357 of the Code of Criminal Procedure, has ordered that upon depositing the amount of fine of Rs.5,000/- by the appellant-accused, amount of Rs.4,000/- to be paid to the injured-Gita towards compensation.

2. The appellant has challenged the impugned judgment and order by raising various grounds as mentioned in paragraph 6 of the memo of appeal. Mr.Parikh, learned Counsel for the appellant has taken me through all these grounds and the oral as well as documentary evidence led during the course of trial by prosecution. To appreciate the rival side contentions that have been raised before this Court by Mr.Parikh as well as by Mr.Bhate, the Court is

inclined to state the case of prosecution in brief.

3. According to prosecution, on 8th April, 1990, at about 10:15 a.m., injured-Gitaben Rasiklal Jaiswal was proceedings towards the pond of Village Raval for washing clothes. At that time, three accused persons chased victim-Gita and assaulted her with an intention to kill her or to cause serious injuries which may result into her death. It is also alleged that the present appellant had given blows with Dharia on three different parts of the body of injured-Gita, whereas the original accused Nos.2 and 3 were instigating the accused No.1. It is the say of prosecution that prior to the incident, a quarrel was taken place on a trifle issue for putting and igniting hearth which was used for cooking food and injured-Gita had used improper words during that quarrel. Thereafter, she had proceeded towards the village pond with her mother and her mother was carrying clothes for washing. When they were about to reach to the bank of pond, the victim-Gita was assaulted by the appellant.

4. Three accused persons were prosecuted for the offence punishable under Section 307 read with

Section 34 of the Indian Penal Code and after evaluating the evidence, the trial Judge has acquitted the original accused Nos.2 and 3; as there was no legal or convincing evidence to show that they were sharing common intention with the appellant-original accused No.1. But, the trial Court found accused No.1-present appellant is guilty of the charge of offence punishable under Section 326 of the Indian Penal Code, meaning thereby the offence punishable under Section 307 is not made out but in view of the nature of injures found on the body of injured, the accused can be convicted under Section 326 of the Indian Penal Code.

5. Mr.Parikh, learned Counsel appearing for the appellant has submitted that the impugned judgment and order is not sustainable, as there are certain infirmities in the evidence led by the prosecution and therefore the accused should be acquitted by this Court. He has also pointed out some inconsistency in the evidence of injured herself and her failure to identify the muddamal weapon that was used in the commission of offence. When the case of prosecution is that the muddamal Dharia blows were inflicted and injured herself is not able to identify that weapon

then in that fact situation the accused could not have been linked with the crime, is one of the main submission. It is also argued that there is no consistency in the evidence as to the actual place of occurance. To develop this point, Mr.Parikh has taken this Court through the evidence of victim-Gita, her mother and another witnesses examined by prosecution i.e., Prosecution Witness No.4- Bhikhbhai Shantilal Solanki and Prosecution Witness No.5- Thakorbhai Ambalal Solanki. However, P.W.No.4 has not supported the case of prosecution. And, if the evidence of Prosecution Witness Nos.4 and 5 are read together, there is confusion as to the actual place of incident and the benefit of this situation obviously would go to the accused. However, the learned trial Judge has ignored this aspect. It is further submitted by Mr.Parikh that as such no specific motive has been placed by prosecution or proved. Undisputedly, the victim girl and the family of the complainant are neighbourers of the accused. They are staying adjacent to each other. There was no animosity between these two families and therefore the accused would not even think of giving such severe blows with Dharia on such a trifle issue and therefore the motive placed by prosecution is highly

improbable and learned trial Judge has not considered this aspect. One more point argued by Mr.Parikh is that, even as per the evidence available on record, the injured victim-Gita was discharged from Hospital within 15 days so the injuries found or say allegedly caused to her cannot be said to be grievous within the meaning of Section 320 of the Indian Penal Code. He has further submitted that the learned trial Judge ought not to have held the accused guilty of the charge of offence punishable under Section 326 of the Indian Penal Code.

6. The alternative argument advanced by Mr.Parikh is that accused deserves acquittal and at least he should be given the benefit of doubt. He has also submitted that if the Court is of the view that accused has committed some offence, then at least he should not be sent to jail after several years because he is enjoying bail since 1993. The alleged incident is of 1990 and order of conviction is rendered on 29th August, 1992. So, after about 15 years, a person settled in his life during this bail period, if asked to go to jail, then, it will create a lot of inconvenience and hardship to the family of the appellant-accused. The appellant-accused is

having three minor children out of which two are daughters. He is possessing land ad-measuring two vighas, otherwise he is also doing labour work in one Apollo Tires Company where he is not regular employee. He has already undergone imprisonment of about 14 months including the period spent as under trial. Mr.Parikh has also submitted that the learned trial Judge has imposed fine of Rs.5,000/- and out of which Rs.4,000/- is ordered to be given to the victim towards compensation, so this Court instead of sending the appellant-accused to prison to serve the sentence after several years, can increase the amount of fine and from that some amount can be given to the victim towards compensation. Because as per say of Mr.Parikh, after lapse of so many years, the relationship of the family of the complainant, victim-Gita and the accused have remained cordial. By now Gita has married and has settled in her life. So, this Court should at least think to alter the order of sentence imposed by the learned trial Court.

7. It is also submitted by Mr.Parikh that appellant-accused is ready to pay any amount of fine that may be imposed by this Court so that substantial portion of fine imposed by this Court can be given to

the victim girl. Earlier this appeal was listed before the other Bench and attempts were made in this direction. The victim-girl was called before the Court, but her mother alongwith her son-real brother of the victim were appeared before the Court. It is submitted by Mr.Parikh that without going into the attempts that have been made in past, this Court can consider the submissions that have been made before this Bench on their own merits.

8. Mr.Bhate, learned A.P.P., has resisted the submission made by Mr.Parikh that the order of conviction is not sustainable in the eye of law. The learned trial Judge has accepted the version of injured victim-Gita as reliable piece of evidence. There was no reason for this witness to falsely implicate the present appellant-accused in serious offence, if the relation between the accused and family of the victim were cordial and they were neighbours. Injured has narrated the incident in a transparent manner and if we look to the injuries found on her body, it clearly supports her version and in her deposition she has stated that a blow was given from her back. She has never stated that a blow was given from the front side and the injury

which is found near joint elbow is on the back portion of the hand. Mr.Bhate, has taken this Court through the nature of injuries found on body of injured person and its severity, vis-a-vis, her oral version before the Court. The evidence of this witness is corroborated not only by medical evidence but also by version of mother of the victim. She was just proceeding ahead of her daughter. Both were proceeding towards the bank of village pond, so it must be the outskirts of village. Even, P.W.No.4 who has not supported the case of prosecution, does not dispute the actual occurance of the incident and the alleged infirmity found in the evidence of P.W.No.5 is only qua the distance between the assailant and the victim or the assailant and this witness (P.W.No.5) but this witness has positively stated that incident occurred wherein victim-Gita sustained injury and the accused is the author of the blow given.

9. According to Mr.Bhate, the learned trial Judge has rightly acquitted the present appellant for the offence punishable under Section 307 of the Indian Penal Code and convicted under Section 326 of the Indian Penal Code in view of the ratio of the

decision of this Court in case of **Mohanbhai Ranchhodbhai Vs. State of Gujarat, reported in 1993 (1) G.L.H. 28.** In this cited decision, the Court has modified the order of conviction from the offence punishable under Section 307 to under Section 326 of the Indian Penal Code. The Court has stated as follows.

> *"13. .... Next Question to be considered is as to what was his intention. It is true that he has used the ordinary knife and has selected the vital part of the body, namely, stomach and abdomen. According to the doctor the said injury was likely to cause death. Question is if by the very injury if the person had died can it be said that the accused would be guilty of offence of murder ? For this purpose intention as also nature of the injury are to be taken into consideration and one of the considerations would be objective nature of the injury, whether it is sufficient in the ordinary Court of nature to cause death. There is difference between the words "likely to cause death" and the words "sufficient in the ordinary course of nature to cause death". Injury which is sufficient in the ordinary course of nature to cause death has more probability of death. Under the circumstances in the present case if at all death would have occasioned because of the aforesaid injuries the accused could not have been held guilty for the offence of murder. Therefore, finding of the Trial Court on the*

point of conviction for the offence under Section 307 IPC requires to be modified.

14. According to the medical evidence there was grievous hurt and was likely to endanger human life. When grievous hurt is caused by the instrument like knife it would be an offence under Section 326 IPC. When there is grievous hurt there is no question of considering the point as to whether it would be an offence under Section 324 IPC. Therefore, it is clear that the appellant has committed offence under Section 326 IPC. Accordingly we modify the conviction of the appellant."

9.1 So, according to Mr.Bhate, learned A.P.P., the order of conviction recorded by the learned trial Judge for the offence punishable under Section 326 of the Indian Penal Code is valid order of conviction in view of the aforesaid ratio of this Court.

10. On evaluation of the evidence, the Court finds that there is enough force in the submission made by Mr.Bhate and Mr.Parikh has fairly accepted that considering the totality of the evidence, he was tempted to make alternative submission before this Court. The learned trial Judge has imposed simple imprisonment of five years. The learned trial Judge has not imposed rigorous imprisonment and the

respondent-State has not preferred any appeal praying for enhancement in the period of punishment so it is not legally possible for this Court to convert the imprisonment from simple to rigorous, because it amounts to enhancement in punishment. The learned trial Judge has imposed fine of Rs.5,000/-, which cannot be said to inadequate or unreasonable but when the learned trial Judge has thought on the point whether victim deserves any compensation under Section 357 of the Code of Criminal Procedure, then in that situation, some amount of fine ought to have been increased because the injury received by the victim is on her face which was caused by the accused perhaps may have resulted into disfiguration of look of any unmarried girl. One more aspect is that sending the person in prison for longer period is not important. In each order of punishment / sentence the Court should not try to insert the element of deterrence. The punishment / sentence should be such that it carries the true message to the society and the wrong doer. The social impact of the order of punishment should be effective and such effect itself is sufficient, sometimes, in taking message of deterrence to the other members of the society. The higher amount of fine imposed for the offence works

as a preventive medicine. That a pointed query was placed to Mr.Parikh, whether the substantive sentence is reduced to eighteen months and whether the appellant is ready to pay fine of Rs.50,000/- so that some additional amount can be given to the victim girl. In response thereof, Mr.Parikh has submitted that, if the accused is asked to serve the sentence for about three to four months, he may loose his job from where at present he is working and it would not be even safe for the young wife and two minor daughters of the appellant-accused. So this Court even can think of increasing the amount of fine but at least appellant-accused may not be asked to go to prison again keeping in mind the period that has been lapsed between the year 1990 and 2007, the year of incident and the year of hearing of the present appeal.

11. Learned A.P.P., has submitted that the respondent-State is not interested in sending the appellant-accused to prison again and the Court may increase the amount of fine that may be deemed fit.

12. Mr.Parikh states that he shall intimate the appellant-accused about his legal obligation to pay

the amount of fine within two weeks, which may be decided by this Court.

13. In the result, the present appeal is partly allowed. While confirming the judgment and order of conviction for the offence punishable under Section 326 of the Indian Penal Code, passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No.159 of 1990 on 29th August, 1992, the order of sentence is modified and reduced to the extent of imprisonment actually undergone by the appellant, including the period of imprisonment undergone as an under-trial prisoner, instead of, simple imprisonment of five years.

13.1 So far as the sentence of fine is concerned, the same is modified to the effect that the appellant shall pay the fine of Rs.75,000/- and in default of making payment of fine, he shall undergo simple imprisonment for two years. However, as the appellant has already paid the amount of fine of Rs.5,000/-, he shall now pay Rs.70,000/- before the concerned trial Court within a period of two (02) weeks from today, failing which the learned trial Judge shall issue non-bailable warrant against the appellant to secure

his custody and thereafter he shall be sent to prison to serve the in default punishment. On depositing the amount of fine by the appellant-accused, the learned trial Judge shall issue Notice to the victim girl-Gitaben and shall pay Rs.66,000/- (Rupees Sixty Six Thousand Only) i.e., Rs.4,000/- + Rs.66,000/- = Rs.70,000/- to the victim girl-Gitaben on proper identification and the remaining amount of fine shall be deposited with the State Exchequer.

13.2 At present the appellant is on bail. Bail Bond executed by the appellant is cancelled. However, he shall be treated as a person deemed to be on bail for a period of two weeks enabling him to arrange for the amount of fine so as to deposit the same before the trial Court. Order and Direction accordingly.

(C.K.BUCH, J.)

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